IN THE SUPREME COURT OF FLORIDA

MARK EVAN OLIVE,

Appellant/Cross-Appellee,

v. **CASE NO. SC00-317**

ROGER R. MAAS, in his Official Capacity as Executive Director of the Commission on the Administration of Justice in Capital Cases; and ROBERT F. MILLIGAN, in his Official Capacity as Comptroller of the State of Florida; and ROBERT A. BUTTERWORTH, Attorney General of the State of Florida,

Appellees/Cross-Appellants.
_____/

On Certification From the First District Court of Appeal of a Question Requiring Immediate Resolution by this Court

CROSS-REPLY BRIEF OF APPELLEES/CROSS-APPELLANTS

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CERTIFICATE OF TYPE SIZE AND STYLE

I hereby certify that the size and style of the type used in the Reply Brief of Appellees/Cross-Appellants is 12 Point Courier New.

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Louis F. Hubener

REPLY ARGUMENT

Olive rests his claim to standing and Chapter 86 jurisdiction on several assertions. First, he claims he never challenged the constitutionality of the Registry Act, but sought only a declaration of his rights and obligations under that act, the Rules Regulating the Florida Bar, and the Contract. (Reply and Cross-Answer Brief at 3,16). He also asserts that, "[i]t is undisputed that when Olive filed his Complaint, **he still held the appointment to represent Anthony Mungin that had been entered five and half months earlier.** No one attempted to revoke his appointment the entire time his original challenge, an extraordinary writ proceeding, was pending in this Court." (Reply and Cross-Answer Brief at 18) (emphasis added).

These assertions are not consistent with the record. It is clear that Mr. Olive challenged the constitutionality of the "Registry Act," sections 27.710 and 27.711, Florida Statutes. It is equally clear that he never accepted an appointment to represent Anthony Mungin, and in fact declined to accept it.

Paragraphs 19 and 20 of the amended complaint alleged:

ALLEGATIONS COMMON TO ALL COUNTS

*** * * ***

> **19.** Mr. Olive cannot sign the Contract because **the terms and conditions of the Registry Act** and Contract may compel him to violate the Rules of Professional Conduct, and **may place unconstitutional restraints on Mr. Mungin's**

right to effective assistance of counsel.

20. Pursuant to section 86.051, Florida Statutes (1997), Mr. Olive is entitled to have these doubts removed and seeks a determination as to the construction, **validity and legal effect of the Registry Act**, Contract, and authority of Mr. Maas to declare him ineligible for court-appointed representation of death row inmates.

RI, pp. 124-125 (emphasis added).

Count I of the amended complaint began as follows:

COUNT I
DECLARATORY RELIEF

Strict Application of the Fee and Cost Limits in the Registry Act and Contract Unconstitutionally Curtail the Trial Court's Inherent Power to Ensure Adequate Representation

23. Plaintiffs reallege paragraphs 1-22 as it fully alleged herein.

*** * * ***

28. Inflexible imposition of **statutory minimum fees** is an **unconstitutional curtailment** of the court's inherent power to ensure adequate representation in capital cases.

*** * * ***

R I, p. 128 (emphasis added) (case citations omitted from paragraph 28).

The representation to this Court that Olive held an appointment to represent Mungin until it was "revoked" by Judge Moran conflicts with Olive's representation to Judge Moran in his

counsel's letter of February 22, 1999:

> While an order has been entered appointing Mr. Olive, **he has not accepted that appointment** by entering into the necessary contract with the Comptroller or his designee.

R I, p. 123 and amended complaint exhibit D (emphasis added).

Furthermore, section 27.711, Florida Statutes (Supp. 1998), provides:

> **(2)** After appointment by the trial court under s. 27.710, **the attorney must immediately file a notice of appearance with the trial court indicating acceptance of the appointment to represent the capital defendant** throughout all postconviction proceedings, including federal habeas corpus proceedings, in accordance with this section or until released by order of the trial court.

(Emphasis added).

Mr. Olive does not represent either in the amended complaint or in his briefs that he filed a notice of appearance and accepted the appointment. Judge Moran did no more than revoke an offer of an appointment that Mr. Olive had refused to accept. See R I, p. 118 (amended complaint exhibit G).

I. PLAINTIFF OLIVE LACKED STANDING AND THE TRIAL COURT LACKED JURISDICTION OVER COUNTS I AND II OF THE AMENDED COMPLAINT.

In his reply and cross-answer brief, Mr. Olive contends he had standing to seek a declaratory judgment "on the validity of the contract," which, he claims, the trial court had jurisdiction to entertain. In fact, as shown, Counts I and II of the amended complaint challenged the constitutionality of both section 27.711 and the contract. Mr. Olive, however, never represented Anthony Mungin pursuant to the provisions of section 27.711 and never was a party to the contract he assailed.

Count I of the amended complaint was nothing more than a transparent attempt to have the trial court declare, on constitutional grounds and in advance of representation, that Mr. Olive was entitled to more money for fees and costs in representing Anthony Mungin than provided for by section 27.711 simply on the basis of Olive's belief that he would spend more time on the case than the statute contemplated. Count II was nothing more than an attempt to have the court adjudicate hypothetical ethical conflicts that might never occur even if Mr. Olive did represent Anthony Mungin.

Under these circumstances, Mr. Olive was not affected by section 27.711, as he had never accepted appointment under that section, and he was not affected by the contract, because he had declined to sign it. He therefore lacked standing to bring this

action, and the lower court lacked jurisdiction to hear it:

> [T]he trial court had **no jurisdiction** to consider [the validity of certain statutory provisions] under the declaratory judgment act and erred in doing so....[B]efore [plaintiff] may bring a declaratory action concerning the statute's validity, he must show that his rights, status, or other equitable or legal relations "are affected by a statute." There must be a bona fide need based on present, ascertainable facts for an action to be considered under the declaratory judgment act.

Martinez v. Scanlan, 582 So.2d 1167, 1174 (Fla. 1991) (emphasis added) (citations omitted). See also State v. Kirkman, 27 So.2d 610, 611-612 (Fla. 1946) ("It is settled law that a party seeking an adjudication by the court of the constitutionality of an Act, in order to be heard, is required to show that his constitutional rights have been abrogated by the challenged Act... Courts are without power per se to inquire into the validity of public laws in proceedings brought directly for such purpose by one whose rights are not affected by the operation of the Act.") (citations omitted).

As an attorney on the registry, Mr. Olive's rights and legal relations were not affected by section 27.711. Whether he would or would not be adequately compensated in any given case could not be determined unless he undertook representation. And the same may be said for his perceived ethical quandaries. Simply put, there were no "present, ascertainable facts" that entitled him to a declaratory judgment under either Count I or Count II. As pointed

out in the previous brief filed by the Attorney General and the Comptroller, over fifty Registry attorneys have actually accepted appointments pursuant to section 27.711. These attorneys may raise any and all of the issues that so vex Mr. Olive in the context of real cases where there are "present, ascertainable facts." Mr. Olive's singular response to this point is to cast aspersions on the professionalism, competence and integrity of this entire group.

The case authority adduced in support of Olive's standing claim is similarly lacking. Only one case, Holley v. Adams, 238 So.2d 401 (Fla. 1970), even concerns the constitutionality of a statute and it is inapposite.[1] In Holley, this Court simply held that the plaintiff, a circuit judge who had taken numerous steps in preparation for becoming a candidate for election to the Florida Supreme Court, had standing to challenge the facial constitutionality of the "resign to run" law. This Court rejected the appellee's contention that the plaintiff was merely seeking "advice as to his future action." Id. at 404.

It is not clear what more the circuit judge in Holley could have done to demonstrate his good faith interest in being a candidate, but it is indisputable that the "resign to run" law

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[1]In Martinez v. Scanlan, this Court pointedly cautioned trial courts "to exercise their discretion **guardedly** when considering requests for a declaratory judgment on a statute's constitutionality." See 582 So.2d at 1171 n.2 (emphasis added). Except for Holley, none of the cases Olive cites in support of his standing claim involve challenges to the constitutionality of a statute.

barred his candidacy as long as he remained a circuit judge. Olive, in contrast, has challenged the amount of compensation he could expect to receive for representing Anthony Mungin when, in fact, he had declined to represent Mungin. His ethical claims also depend on facts that may only be hypothesized and that may never occur. He pleaded no disagreement with any of the appellees over controlling law. He therefore has nothing in common with the plaintiff in Holley.

Olive's reliance on Harris v. Groves Realty, Inc., 315 So.2d 528 (Fla. 4th DCA 1975), is even more misplaced. There a contract for purchase of real estate existed, and the plaintiff-broker, obviously a third-party beneficiary, sued for his commission. In this case, there was no contract because Olive declined to enter one.

Olive, unlike the many Registry attorneys who have accepted appointment, may never represent a capital defendant pursuant to the provisions of section 27.711. What Olive sought, and what the trial court had no jurisdiction to render, was an advisory opinion:

> Even though the legislature has expressed its intent that the declaratory judgment act should be broadly construed, there still must exist some justiciable controversy between adverse parties that needs to be resolved for a court to exercise its jurisdiction. Otherwise, any opinion would be advisory only and improperly considered in a declaratory action.

Martinez v. Scanlan, 582 So.2d at 1170-1171.

In a final effort to justify this wholly unnecessary appeal, Olive claims he should be entitled to a declaratory judgment because the appellees now agree with him on the law. In fact, the appellees have never taken the position that section 27.711 or the contract prohibited additional compensation that might be properly awarded under the principles enunciated in Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986), White v. Pinellas County, 537 So.2d 1376 (Fla. 1989), and Remata v. State, 559 So.2d 1132 (Fla. 1990), and Mr. Olive did not plead he had any dispute with any of the appellees over the applicable law. Appellants did not concede, however, that Mr. Olive was entitled to a declaratory judgment on the bare allegations that he believed he would be required to spend more hours on a case than section 27.711 contemplated. He has no right to be compensated for every hour he spends on a case or would like to spend.

A trial court cannot determine the right to additional compensation under the principles of Makemson, White and Remata without real facts in a real case. In the complete absence of any contract and any facts, Mr. Olive had no right to challenge section 27.711, and the trial court was without jurisdiction to declare that Mr. Olive had any right to compensation beyond that provided for in the statute.

The trial court should have dismissed Counts I and II of the amended complaint.

CONCLUSION

Because Mr. Olive lacked standing and the trial court lacked jurisdiction over Counts I and II of the amended complaint, this Court should vacate the final order and remand with directions to the lower court to dismiss those counts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to STEPHEN F. HANLON, Esquire, and SUSAN L. KELSEY, Esquire, of Holland & Knight LLP, P.O. Drawer 810, Tallahassee, Florida 32302, counsel for appellant/cross-appellee; ROBERT J. SHAPIRO, P. O. Box 1288, Tampa, Florida 33601, counsel for appellant/cross-appellee; and to MICHAEL PEARCE DODSON, Esquire, General Counsel, Office of Legislative Services, The Florida Legislature, Room 701, 111 West Madison Street, Tallahassee, Florida 32399-1400, counsel for appellee/cross-appellant Maas, this ____ day of May, 2000.

_____
Louis F. Hubener
Attorney for Appellees/Cross-Appellant's Milligan and Butterworth